IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 3406 OF 2002

IN

SUMMARY SUIT NO. 3929 OF 2002

Stallion Rubber Limited **..Plaintiff**

versus

Maharashtra State Road

Transport Corporation **..Defendants**

Mr. Shailesh Shah i/b. U. S. Shetty for the Plaintiff.

Mr. U. J. Hegde i/b. G.S. Hegde & Associates for the Defendants.

CORAM : D. G. DESHPANDE,J.

DATE : 1ST OCTOBER 2004.

ORAL ORDER :

1. Heard learned counsel for the parties. Plaintiff has filed this suit against the two bank guarantees which the plaintiff gave to the defendants. Those bank guarantees have been annexed to the plaint at Exhibits 'B' and 'C'. Those bank guarantees were given by the plaintiff to the defendants in pursuance of a rate contract entered

into between the parties on 30.6.1999. As per the rate contract the plaintiff was to supply Precured Tread Rubber, Bonding Gum and Black Vulcanising Solution on annual rate contract basis. I am told that value of the contract was about Rs.1.35 lacs. These two bank guarantees were given respectively for Rs.75,000/= and Rs.5,00,000/= and they are as per Clauses 15 and 16 of the rate contract. Those clauses are material and relevant for the purpose of this notice of motion, therefore they are reproduced below:

> "15. SECURITY DEPOSIT: You are requested to arrange to deposit a sum of Rs.5,00,000/= (Rs. Five Lakhs only) in cash or in the form of Bankers Guarantee on Stamp paper of Rs.100/- (Speciman form already sent) valid upto 31.12.2000 for due and proper fulfilment of Rate Contract. The Bankers Guarantee should be from a schedule bank or Nationalised Bank. The firm have given Bank Guarantee against the Rate Contract as detailed below:-
>
> Name & Address of the Bank : Andhra Bank. R. K. Puram, New Delhi-22.
>
> Bank Guarantee No. & Dt. 99012 dt. 23.6.99.

Bank Guarantee amount : Rs.5,00,000/-
(Rs. Five lakhs only).
Bank Guarantee valid upto :
31.12.2000.

During the course of contract, our units are likely to raise claims on account of rejections, damages, shortages, demurrage, penalty, risk purchase, etc. which may please be settled on priority directly with the units. Failure in timely settlement of such claims will compel us to approach your Bankers for encashment of above Bank Guarantee.

"16. PERFORMANCE BANK GUARANTEE: Your Tread Rubber will give 35000 Kmtrs. performance. You will also give Bank Guarantee amounting to Rs.75,000/= (Rs. Seventy thousand only) in cash or in the form of Bankers Guarantee on stamp paper of Rs.100/-) (Specimen form already sent) valid upto 14.06.2001 towards security for average 35000 Kmtrs. The Bankers Guarantee should be from a Schedule or Nationalised Bank. Our concerning Units will lodge the claims against Kmtr. guarantee directly on you

from time to time. The kilometers guarantee is not applicable for Trade Rubber (Low NSD). The firm have given Performance Bank Guarantee against the Rate Contract as detailed below:-

Name & Address of the Bank : Andhra Bank, R. K. Puram, New Delhi - 22.

Bank Guarantee No. & Dt. 99011 dt. 23.6.99.

Bank Guarantee amount : Rs.75,000/- (Rs. Seventy Five Thousand only)

Bank Guarantee valid upto: 14.06.2001."

2. The plaintiff was required to file the suit because the notice was given by the defendants for non payment of dues of Rs.14,56,000/= and in which warning was given that if the amount is not paid the defendants will be compelled to recover the same from the bills then outstanding or by encashing the bank guarantees. An exparte ad-interim order was granted in favour of the plaintiff and now notice of motion is coming up for final hearing. Counsel for the plaintiff contended that the plaintiff gave two different bank guarantees for two different purposes. Bank Guarantee for Rs.75,000/= was a performance bank guarantee directly concerned with the average kilomters retreading repair tyres were

to give. Therefore according to him if, at all there is any shortage in performance of certain fixed kilometers the defendants get right to invoke the bank guarantee which is only for Rs.75,000/= because that is the performance bank guarantee. Counsel for the plaintiff relied upon the judgment of the Supreme Court reported in **AIR 1999 Supreme Court 3710 Hindustan Construction Co. Ltd. vs. State of Bihar & Ors.,** wherein Supreme Court observed **as** under:

> "What is important, in matter of grant of injunction restraining invocation of Bank guarantee is that the Bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation,

therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad."

3. Counsel for the plaintiff therefore contended that the invocation has to be in accordance with the terms of the Bank Guarantee or else the invocation thus would be bad. Since according to him the guarantee given by the plaintiff about the kilometers, the performance was covered by clause 16 of the Rate Contract. Then if there was shortage of kilometers as alleged by the defendants then they were entitled at the most to invoke bank guarantee of Rs.75,000/= only and they had no right to invoke bank guarantee for Rs.5 lacs. According to the counsel for the plaintiff two bank guarantees of Rs.5,00,000/= and Rs.75,000/= were obtained by them for two distinct purposes and that the second guarantee of Rs.75,000/= was directly related to non performance in kilometers and since entire claim of the defendants as per their notice is about less kilometers being given by the retreaded tyres, than the defendants were not entitled to invoke the bank guarantee for Rs.5,00,000/= given as per clause 15.

4. On the other hand counsel for the defendants contended that the law relating to Bank Guarantee is

absolutely clear. He relied upon the judgment of the Supreme Court reported in **(1997) 6 Supreme Court Cases 450 Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and another**, wherein the Supreme Court has held as under :

> "Courts should be slow in granting an injunction to restrain realisation of bank guarantee. Courts have carved out two exceptions: (1) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of it, then he can be restrained from doing so. But for that, the fraud has to be an established fraud. (2) Where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery

of the amount from the beneficiary , by way of restitution."

5. Counsel for the defendants therefore contended that firstly no fraud is pleaded by the plaintiff anywhere in the plaint or in the notice of motion in respect of a bank guarantee, and, secondly according to him this is not a case where the plaintiff would suffer irretrievable injury. Counsel for the defendants contended that claim of the defendants from the plaintiff is more than Rs.14 lacs and the value of both the guarantees is Rs.5,75,000/= and therefore even if the bank guarantees are invoked still amount of about Rs.7 lacs or so would be recovered from the plaintiff.

6. Apart from this, Counsel for the defendants contended that clause 15 of the Rate Contract gives a right to invoke the Bank Guarantee. He drew my attention to the clause beginning with the words "During the course of contract .....encashment of the Bank guarantee." He contended that whatever material was supplied by the plaintiff was to a certain standard to meet requirements of the defendants regarding kilometers and even if clause 16 is introduced / inserted in the rate contract that does not take away the right of the defendants

to invoke the bank guarantee of Rs.5 lacs because it is a claim on account of shortages (shortages in kilometers). He also contended that so far as clause 15 is concerned it is claim for actual loss and claim of Rs.75,000/= in clause 16 is about damages.

7. He drew my attention to the notice Exhibit F-2 given by the defendants to the plaintiff wherein particulars of the shortages in kilometers have been given as received by them from different depots or sub stations of the defendants.

8. It is in this background that the aforesaid notice of motion and the prayer of the plaintiff has to be considered for continuation of adinterim injunction.

9. Counsel for the plaintiff contended that he has pleaded fraud and according to him making a complaint about quality after two years is nothing but a fraud on the part of the defendants. I do not think that the fraud that is envisaged by the Supreme Court or contemplated in the aforesaid Judgment of (1997)6 SCC 450 is the fraud pleaded by the plaintiff. A fraud has to be there in obtaining bank guarantee and as such this is not a case where

the plaintiff pleads fraud in that regard. Consequently it is also not a case of irritrievable loss. However, counsel for the plaintiff strenuously urged that if the invocation of the bank guarantee is in accordance with the terms then that can also give a separate cause of action in addition to the case of fraud and irritrievable loss. He again drew my attention to clauses 15 and 16 of the Rate contract and contended that so far as performance of the retreaded tyres was concerned, it was a case covered by clause 16 only and clause 15 was not applicable and since clause 16 was restricted to Rs.75,000/=, the defendants were not entitled to invoke clause 15 for bank guarantee of Rs.5 lacs.

10. I have already reproduced both the clauses 15 and 16. However, even at the risk of repetition it is seen that in clause 16 what is written is "Your Tread Rubber will give 35000 kilometers performance. You will also give Bank Guarantee amounting to Rs.75,000/= (Rupees Seventy Thousand only) in cash or in the form of Bankers Guarantee towards security for average 35000 kmtrs." Whereas clause 15 require the plaintiff to give a bank guarantee for due and proper fulfillment of the rate contract and it covers cases or claims on account of rejections,

damages, shortages, demurrage, penalty, risk purchase, etc. which may be settled on priority directly with the units. This clause also empowered the defendants to invoke the bank guarantee if there is failure in timely settlement of such claim. A minute reading of both the clauses will clearly show that even if clause 16 is there with reference to the performance, clause 15 is very broadly worded it does not exclude any claim arising out of shortages in kilometers. The words used in clause 15 are with reference to the due and proper fulfiment of rate contract. Now if the rate contract is for a particular performance, viz. responsibility of the plaintiff to supply Precured Tread Rubber, Bonding Gum and Black Vulcanising Solution, for the purpose of enabling the defendant to use those materials in retreading of tyres then there is an ample assurance of quality of the material supplied. If the material supplied by the plaintiff does not satisfy the requirements of quality and it consequently affects the average kilometers running of the tyres then the defendants get right to invoke both the bank guarantees under clauses 15 and 16. Merely because the performance bank guarantee as per clause 16 is separately obtained, that will not absolve the plaintiff of its liability to satisfy the requirements of certain standard in respect of the

goods supplied by it. The claim of the defendants is based not only on shortages in kilometers but is also impliedly for supplying sub standard material or material not fulfilling the required standard, which was to be ultimately gauged and measured in the running capacity of the tyres in kilometers. Therefore both the clauses, viz. clauses 15 and 16 of the rate contract give power to the defendants to invoke the bank guarantee in cases arising out of non fulfilment of the rate contract properly and duly, as contemplated by clause 15. Similarly, it also empowers to the defendants to invoke the bank guarantee for Rs.75,000/= about 35000 kilometers requirement.

11. There is also one more aspect to this agreement or rate contract, if at all the plaintiff has supplied goods worth Rs.1.34 lacs and all the goods / materials supplied by the plaintiff was to be used by the defendants for manufacturing retreading tyres, then it does not appeal to reason that the defendants would resort into its right to recover Rs.75,000/= in case of non fulfilment of the contract.

12. The basis purpose of obtaining both the Bank Guarantees is due and proper fulfilment of the rate

contract and towards security for average 35000 kilometers, so this second clause i.e. clause 16 is for the purpose of security only but the real claim will be arising in situation where there is rejections, damages, shortages, demurrage, penalty, risk, purchase etc.

13. Therefore when the claim arises out of the grounds mentioned in clause 15 and the defendants make a claim of that amount then failure of the plaintiff to settle that claim, gives them a right to invoke bank guarantee of Rs.5 lacs also. Therefore, contention of the Counsel for the Plaintiff that invocation of bank guarantee for Rs.5 lacs is not in conformity with the terms of the bank guarantee, cannot be accepted. In the result, it has to be held that the plaintiff has failed to make out prima facie case for confirmation of the order granted in its favour earlier at ad interim stage. With the result, notice of motion is rejected.

14. After this order was pronounced, counsel for the plaintiff prayed for continuation of ad interim order for four weeks in order to enable him to challenge this order in appeal. However, looking to the amount involved of Rs.5,75,000/= and the business given by the defendants for Rs.1.34 crores,

the prayer of the stay is not found fit and proper, prayer for stay is rejected.

15. An ordinary copy of this order be supplied to the parties and all concerned parties to act on an ordinary copy of this order duly authenticated by the Court Associate.

1.10.2004 (D. G. DESHPANDE, J.)